In the Supreme Court

OF THE

United States

OCTOBER TERM, 1942

No. [redacted]104

PACIFIC STATES SAVINGS AND LOAN COMPANY and STATE GUARANTY CORPORATION,
Petitioners,

vs.

BABETTE M. TREDE and SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondents.

BRIEF FOR RESPONDENT SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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I. OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of California is reported in Volume 134 Pacific (2d) page 745 and shows that decision was filed February 19, 1943, and a rehearing denied March 18, 1943.

II. JURISDICTION.

The date of the judgment of the Supreme Court of the State of California sought to be reviewed was February 19, 1943 (R. p. 38, folio 68). A re-hearing was denied by the Supreme Court of California on March 18, 1943 (R. p. 43, folio 77).

Petition for a writ of certiorari was filed June 15, 1943, and served on the Attorney General of the State of California on June 24, 1943.

Jurisdiction is disputed for lack of a final judgment within the meaning of Section 237(b) of the Judicial Code, and for lack of a substantial Federal question.

III. CORRECTION AND AMPLIFICATION OF STATEMENT OF THE CASE.

Nowhere in the record or in the petition for the writ of certiorari in this case does it appear that any application was ever made pursuant to Section 13.12 of the Building and Loan Act of California (printed in petitioners' petition herein p. 7), to the court rendering the judgment for an injunction against the Commissioner pending the appeal from further proceedings, or directing him, pending the appeal, to surrender the business property and assets of the association, or that any application was ever made by petitioner or the intervenors for an order fixing the amount of bond for such stay or injunction, pursuant to Section 943 of the Code of Civil Procedure of California, or that any such bond was ever tendered to said Superior Court by either petitioner for the

writ of prohibition or the intervenors herein, the petitioners for the writ of certiorari in this case; nor was any application ever made to the Supreme Court of California for a writ of supersedeas to obtain a stay of liquidation pending the appeal mentioned in Paragraph III of the petitioners' petition for a writ of prohibition (R. p. 4).

IV. SUMMARY OF ARGUMENT.

A. The petition for writ of certiorari should be denied for want of a final judgment under 28 U. S. C. A. 344 (Jud. Code, Section 237).

B. The petition for writ of certiorari should be denied for lack of any substantial Federal question.

C. On the merits, the petition for a writ of certiorari should be denied for want of a substantial Federal question.

V. ARGUMENT.

A. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED FOR WANT OF A FINAL JUDGMENT UNDER 28 U. S. C. A. 344 (JUD. CODE, SECTION 237).

We are aware of the rulings of this Court that prohibition is an independent proceeding and that the judgment therein is a final judgment. We are also aware that in *Bandini Petroleum Co. v. The Superior Court,* 284 U. S. 8, 14, this Court has held that a denial of a writ of prohibition to an inferior tribunal is a final judgment supporting the jurisdiction of this Court.

Nevertheless, it seems to us that there is a vast difference between a final judgment *granting* a writ of prohibition which, in effect, puts an end to the respondents' rights in the courts of a state, and a judgment *denying* a writ of prohibition to a lower *court,* which must be assumed to proceed under due process and where, presumptively, every safeguard will be afforded to the petitioners in the court below. Such a judgment is in substance a remand with directions to proceed not inconsistently with the decision above. Such a judgment should *not* be deemed a *final* judgment.

Laclede Gas Co. v. Public Service Comm., 304 U. S. 398;

Hand v. Haygood, 131 U. S. App. CLXXXI, 26 L. Ed. 301.

The denial of prohibition here, in effect, remanded the matter to the superior court to proceed with its judicially-controlled sale according to all the process of law given by the State of California.

B. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED FOR LACK OF ANY SUBSTANTIAL FEDERAL QUESTION.

The charge that a statute allowing an appeal, without necessarily staying the execution of the judgment appealed from, denies due process of law, has been considered so unsubstantial by this Court and other Federal courts that have passed upon it, that they have refused to dignify it with argument.

McKane v. Durston, 153 U. S. 684, 688.

Harlan, J. says:

"What has been said is sufficient to indicate that in our judgment, there is nothing of merit in this contention. It need not be further noticed."

In re Durrant (CC Cal. 1898), 84 Fed. 317, 319 (Coram Morrow, Circuit Judge, and DeHaven, District Judge).

DeHaven, J. says:

"It is claimed by the petitioner:

"First, that sections 1227 and 1243 of the Penal Code of the State of California are in violation of the Constitution of the United States, because they do not provide that an appeal from an order directing its execution, made after a final judgment of conviction, shall, of itself, operate to stay the execution of such judgment. This contention is manifestly untenable, and nothing further need be said upon that point."

C. ON THE MERITS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

The decision of the Supreme Court of California does not deprive the petitioners or the intervenors of property without due process of law.

Lott v. Pittman (1916), 243 U. S. 588, 591.

McKenna, J. says:

"Besides, the right of appeal is not essential to due process. *Reetz v. Michigan,* 188 U. S. 505,

508. It was therefore competent for the State to prescribe the procedure and conditions, and the cases cited by appellant are not apposite."

McKane v. Durston, 153 U. S. 684, 687.

Harlan, J. says:

"A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review.

"It is, therefore, clear that the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be deemed proper. * * * But, as already suggested, whether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself."

Andrews v. Swartz, 156 U. S. 272, quotes and follows *McKane v. Durston,* supra.

Murphy v. Massachusetts, 177 U. S. 155, 158.

Fuller, C. J. says:

"And we have repeatedly decided that the review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, is not a necessary element of due process of law, and that the right of appeal may be accorded by the State to the accused upon such conditions as the State deems proper."

American Surety Co. v. Brim (1933), 176 La. 867, 147 So. 18, 19.

St. Paul, J. says:

> "As an appeal is not necessary to due process of law, a State may annex any conditions it pleases to the granting of an appeal."

In *ex parte Martinez* (Tex. Crim. App. 1912), 145 S. W. 959, 994,

Harper, J. says:

> "What is due process of law in the states is regulated by the law of the state. (Citing cases.)"

The same ruling has been made with regard to the due process clause of the *Fifth* Amendment.

Clawson v. U. S., 113 U. S. 143 (appeal from the Territory of Utah);

U. S. v. Heinze, 218 U. S. 532, 545-6.

But it is a sufficient answer to the complaint of the petitioners here that the record does not show that they ever made application to the court from which the appeal was taken for a stay order or injunction, or ever applied to that court to fix a bond, or ever tendered a bond under the Building and Loan Act of the State of California. That Act, Sec. 13.12 thereof, (Petition herein p. 7) reads:

> "An appeal from such judgment enjoining the Commissioner from further proceeding and directing him to surrender such business, property and assets to such association *shall not operate as a stay* thereof, unless the trial court in its discretion shall so order and no bond need be given if such appeal be taken by the Commis-

sioner; but if such judgment dismisses such application an appeal therefrom shall not operate as a stay thereof but the court rendering such judgment may, in its discretion, enjoin the Commissioner, pending the appeal, from further proceedings and direct him, pending the appeal, to surrender such business, property and assets to such association, providing a bond shall be given as required by Section 943 of the Code of Civil Procedure."

Section 943 of the Code of Civil Procedure requires an undertaking to be entered into on the part of the appellant with at least two sureties, and in such amount as the court, or a judge thereof, may direct, to the effect that the appellant will obey the order of the appellate court upon the appeal, or will pay all damages which the respondent may sustain by reason of such stay, not exceeding an amount to be fixed by the Judge of the court in which the judgment was rendered or order made, which amount must be specified in the undertaking.

Nor does it appear that the petitioners here ever applied to the court to which the appeal was taken for a writ of supersedeas staying proceedings below.

The California court has complete power to protect the subject matter of its litigation pending appeal.

Hill v. Finnigan, 54 Cal. 493, 495.

McKinstry, J. says:

"The statute does not treat of undertakings in the Supreme Court, but we have no doubt but that this court has an inherent power to secure to

> the appellants the fruits of a successful appeal, if it can be done without depriving the respondent of a substantial right."

This is done by the issuance of a writ of supersedeas.

Luckenbach v. Krempel, 188 Cal. 175, 177.

The record shows no application for a writ of supersedeas.

Notwithstanding the appellate jurisdiction of the United States Supreme Court and other Federal courts is given in the Third Article, subject to such regulations as Congress may from time to time prescribe, it is nevertheless true that Congress could not provide regulations which deprived a citizen of property without due process of law under the Fifth Amendment. And neither could the Supreme Court of the United States by rule or decision.

28 U.S.C.A. sections 227 and 874, and Equity Rules 33 and 36, made the granting of a stay order or a supersedeas discretionary with the court.

The same thing was true in the matter of appeals in chancery in England prior to 1772.

The history of stays on appeal in chancery is stated and the cases are collected in

Tulare Irrig. Dist. v. Superior Court, 197 Cal. 649, 660-665.

Yet it has *never,* during the 156 years of our nation's existence, been suggested by anyone that the fact that this discretion is reposed in the court ap-

pealed from, denies due process of law under the Fifth Amendment, nor has anyone suggested, since 1215 A.D., that the English practice ran counter to the 29th section of Magna Carta.

Slaughter House cases, 77 U. S. 273, 297.

Clifford, J. says:

> "Neither does an appeal from an order dissolving an injunction suspend the operation of the order so as to entitle the appellant to stay the proceedings pending the appeal, as a matter of right, either in a suit at law or in equity."

Hovey v. McDonald, 109 U. S. 150, 162.

Bradley, J. says:

> "Of course, where the power (to stay the force of a judgment) is not exercised by the court, nor by the judge who allows the appeal, the decree retains its intrinsic force and effect.
>
> "Applying these principles to the present case, it is clear that the force of the decree was not affected by the appeal although it was in the power of the Special Term to have continued the injunction, and to have retained the fund in its control in the hands of the receiver had it seen fit so to do."

In *Leonard v. Ozark Land Co.,* 115 U. S. 465, 468, the court says:

> "Finding that such a practice, if permitted (modifying the injunction granted by the decree below in advance of final hearing of an appeal on its merits) would sometimes involve an examination of the whole case and necessarily take much time, we promulgated the present equity rule 93."

Knox County v. Harshman, 132 U. S. 14, 16.

Fuller, C. J. says:

> "The general rule is well settled that an appeal from a decree granting, refusing or dissolving an injunction, does not disturb its operative effect. * * * A fortiori, the mere prosecution of an appeal cannot operate as an injunction when none has been granted."

This discretion of the lower court to grant an injunction or a supersedeas is not a matter of right, but in the discretion of the lower court.

Re Haberman Mfg. Co., 147 U. S. 525, holding that the discretion of the lower court is not controllable by mandamus.

The court is slow to grant such a supersedeas.

Chadeloid Chemical Co. v. Chalmers Co. (CCA, N.Y. 1917) 242 Fed. 71, an application to Ward, Circuit Judge, for supersedeas was denied.

Hamnsen v. Pusey Co. (DC Dela. 1923), 286 Fed. 707, 710.

Morris, J. says:

> "No order staying the proceedings has been entered in this cause by this court, or the appellate court, or a judge thereof, nor has such order been applied for."

And he holds that certiorari to the Supreme Court from the Circuit Court of Appeals after decision on appeal, if a supersedeas at all, has no greater effect than had the appeal.

In the *Hannsen* case it was held that the granting of a certiorari by the Supreme Court to the Circuit Court of Appeals on appeal from an order of the District Court appointing the receiver, did not suspend further proceedings in the District Court.

> *Eureka Consolidated Mining Co. v. Richmond Mining Co.*, 5 Sawyer (USCC) 121, Fed. Cas. No. 4549.

Sawyer, C. J. says:

> "The supersedeas undoubtedly stays the issue of a writ of restitution and execution for costs. But none has been issued or asked for."

Certainly, the mere taking of an appeal with or without supersedeas does not terminate the *power* of the lower court.

> *In re Jugiro,* 140 U. S. 291, 296.

Harlan, J. says:

> "It is true that it would have been more appropriate and orderly if the State court had deferred final action until our mandate was issued and filed in the Circuit Court. But in view of the words of the statute, we do not feel authorized to hold that the order of the State court of December 1, 1890, made after the final judgment here of December 1, 1890, was absolutely void. * * * Nothing but an entire want of jurdisdiction in the State court to make the order of December 1, 1890, could have justified the Circuit Court in interfering with the proceedings by writ of habeas corpus. We are of opinion that there was no such want of jurisdiction."

A state statute authorizing an administrative liquidation by a public officer instead of a judicial liquidation by a court is constitutional.

Title Guarantee Co. v. Idaho, 240 U. S. 136;
Gibbes v. Zimmerman, 290 U. S. 326;
State Savings Bank v. Anderson, 165 Cal. 437, affirmed 238 U. S. 611;
Rainey v. Michel, 6 Cal. (2d) 259;
Drapeau v. Fullerton Corp., 8 Cal. (2d) 189.

May we point out too that in California it has long been settled that a receivership is simply a provisional remedy within the suit, and that an appeal from the judgment appointing the receiver does not stay the power of the receiver, in the absence of a stay order.

Matter of Real Estate Associates, 58 Cal. 356;
3 *Corpus Juris,* "Appeal and Error", sec. 1406, p. 1285, note 31, and cases cited.

The respondent court, therefore, respectfully urges that the petition for certiorari is entirely without merit and should be denied.

Dated, San Francisco, California,
July 7, 1943.

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